Appendix A

United States Court of Appeals for the Second Circuit

No. 168—October Term, 1955

(Argued January 18, 1956. Decided July 20, 1956)

Docket No. 23739

James P. Mitchell, Secretary of Labor, plaintiff-appellant

v.

The Hartford Steam Boiler Inspection and Insurance Company, defendant-appellee

Before: Medina, Hincks and Waterman, *Circuit Judges.*

Appeal by the Secretary of Labor from a judgment of the United States District Court for the District of Connecticut, Smith, J., dismissing his complaint against the Hartford Steam Boiler and Insurance Co. Affirmed.

Stuart Rothman, Solicitor, Bessie Margolin, Assistant Solicitor, Harry A. Tuell, Attorney, U. S. Dept. of Labor, Washington, D. C., Thomas L. Thistle, Regional Attorney, *for plaintiff-appellant.*

Lucius F. Robinson, Jr., John M. Donahue, Hartford, Conn. (Robinson, Robinson & Cole, Hartford, Conn., of counsel), *for defendant-appellee.*

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Cyril Coleman, C. Duane Blinn, Hartford, Conn., *attorneys for Aetna Life Insurance Company, amicus curiae.*

WATERMAN, *Circuit Judge:*

This action, involving the validity under § 7 (e) of the Fair Labor Standards Act, 29 U. S. C. (1952 ed.) § 207 (e), of guaranteed wage contracts of the so-called *Belo* type, was brought by the Secretary of Labor to enjoin the Hartford Steam Boiler Inspection and Insurance Co. (hereafter "Hartford") from violating the overtime provisions of the Fair Labor Standards Act, 29 U. S. C. § 201 *et seq.* The United States District Court for the District of Connecticut dismissed the Secretary's complaint on the ground that defendant's guaranteed wage contracts were not in violation of § 7 (e) of the Act, and the Secretary appeals.

Hartford is a Connecticut corporation engaged in the casualty insurance business, primarily the insuring of steam boilers, pressure vessels, and machinery. It employs approximately 600 inspectors, whose duty it is to determine the initial and continuing suitability of boilers, machinery, etc. for insurance. The duties of these inspectors necessitate irregular hours of work, typically fluctuating between 35 and 50 hours per week. Since 1950 Hartford has paid its inspectors under individual guaranteed wage contracts providing for an hourly rate of pay for the first 40 hours in each work week, time and one-half for each hour over 40, and a weekly guarantee of an amount equivalent to the amount payable if 60 hours were actually worked. Each inspector was notified by a form letter accompanying his contract that it was not contemplated that he would have to work more than 60 hours in any work week, and each employee was required to get company authorization before doing so. In

actual practice, only one quarter of 1% of the work weeks over a two-year period exceeded 60 hours. The District Court found that the hours worked "were expected to fluctuate but to be kept below 60 hours in all but the most exceptional cases."

The sole issue raised by this appeal is whether a guaranteed wage contract complies with § 7 (e) of the Act, 29 U. S. C. § 207 (e), even though the employees subject to that contract do not work a number of hours in excess of the guarantee period specified in the contract in a "substantial proportion" or "significant number" of work weeks.[1] The Secretary, relying primarily on the judicial interpretation of "regular rate" prior to 1949, when the Act was extensively revised and § 7 (e) added, contends that the phrase "regular rate of pay" in § 7 (e) impliedly incorporates the "substantial proportion" requirement; Hartford disagrees. To resolve the issue, we must refer to the words of the statute, its purpose and history, and the cases construing it.

The basic overtime pay requirement of the Act is contained in § 7 (a).[2] It expresses the employer's

[1] The Secretary does not question the bona fides of the contract, the irregularity of the hours worked by the inspectors, and the sufficiency or accuracy of the records kept by Hartford. Hartford, however, contends that its inspectors are exempt from the coverage of the Act as administrative employees under § 13 (a), 29 U. S. C. § 213 (a). The Secretary replies that that question cannot be raised here because no cross-appeal was taken. Because of the view we take as to the validity of Hartford's guaranteed wage contracts, it is unnecessary for us to decide either the merits of this question or whether the issue can properly be raised by Hartford without a cross-appeal.

[2] "SEC. 7(a). Except as otherwise provided in this section, no employer shall employ any of his employees * * * for a workweek longer than forty hours, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed." 29 U. S. C. (1952 ed.) § 207 (a).

obligation in terms of a duty to pay for overtime not less than one and one-half times "the regular rate at which he is employed." The term "regular rate" was not defined in the original Act, nor was any reference made to guaranteed wage contracts. This absence of precise statutory criteria necessarily left to the courts the problem of giving content to the statutory language and of defining the limits within which employers and employees might establish basic and overtime rates by contract. The Department of Labor, which has consistently opposed guaranteed wage plans, initially took the position that any wage plan which did not reflect the actual hours worked in each workweek was invalid. However, this position was rejected by the Supreme Court in *Walling* v. *A. H. Belo Corporation*, 1942, 316 U. S. 624, and guaranteed wage contracts of the type now sanctioned by § 7 (e) were held valid. *Walling* v. *Belo Corporation, supra; Walling* v. *Halliburton Oil Well Cementing Co.*, 1947, 331 U. S. 17. Other Supreme Court cases, while accepting *Belo* as an exception to the usual rule, tended to narrow its application. *Walling* v. *Helmerich & Payne*, 1944, 323 U. S. 37; *Walling* v. *Youngerman-Reynolds Hardwood Co.*, 1945, 325 U. S. 419; *Walling* v. *Harnischfeger Corporation*, 1945, 325 U. S. 427; *149 Madison Ave. Corporation* v. *Asselta*, 1947, 331 U. S. 199; *Bay Ridge Operating Co.* v. *Aaron*, 1948, 334 U. S. 446. The Courts of Appeals, confronted by an exception of uncertain scope, evolved different criteria with the result that each case turned "pretty much on its particular facts." *McComb* v. *Roig*, 1 Cir. 1950, 181 F. 2d 726, 727; cf. *McComb* v. *Pacific & Atlantic Shippers Ass'n*, 7 Cir. 1949, 175 F. 2d 411; *McComb* v. *Utica Knitting Co.*, 2 Cir. 1947, 164 F. 2d 670.

It was against this background of uncertainty that Congress, as part of an extensive revision of the Act of 1949, enacted the present § 7 (e).[5] Section 7 (e) represents a codification of the previous case law only to the extent that it constitutes an express recognition of the validity of guaranteed wage contracts, limited in their use to employees who must work irregular hours and subject to the requirement that the contract be a "bona fide individual contract" or "an agreement made as a result of collective bargaining." The only express limitation on the contract guarantee of pay is that it be "for not more than sixty hours." There is no requirement expressed in the section that there be any sort of relation between that guarantee and the number of hours actually worked.

The Secretary, however, contends that the use of the term "regular rate" in § 7 (e) was meant to incorporate the pre-1949 judicial interpretation of that term, and that these pre-1949 cases establish that specified hourly rates are not "regular rates" unless they have actually received significant or substantial use in determining amounts to be paid to employees. Since the specified hourly rates are only operative when the employees work hours in excess of those guaranteed

[5] "SEC. 7 (e). No employer shall be deemed to have violated subsection (a) of this section by employing any employee for a workweek in excess of forty hours if such employee is employed pursuant to a bona fide individual contract, or pursuant to an agreement made as a result of collective bargaining by representatives of employees, if the duties of such employee necessitate irregular hours of work, and the contract or agreement (1) specifies a regular rate of pay of not less than the minimum hourly rate provided in section 6 (a) and compensation at not less than one and one-half times such rate for all hours worked in excess of forty in any workweek, and (2) provides for a weekly guaranty of pay for not more than sixty hours based on the rates so specified." 29 U. S. C. (1952 ed.) § 207 (e).

in the contract, this is an assertion that a guaranteed wage plan can only be valid if the employees who are subject to the contract work a number of hours in excess of the guarantee period in a "substantial proportion" or "significant number" of workweeks. For the reasons stated below, we think the Secretary's contention that Congress intended to impose a "significant number of workweeks" test on guaranteed wage plans, which in all other respects comply with § 7 (e), is an incorrect interpretation of the Act.

First, the pre-1949 decisions indicate that the law as to guaranteed wage contracts under § 7 (e) was unclear and unsettled. The two Supreme Court cases upholding the validity of guaranteed wage contracts, *Walling* v. *Belo Corporation, supra,* and *Walling* v. *Halliburton Co., supra,* give no indication that the Supreme Court had adopted the "significant number of workweeks" tests as a criterion of validity. In *Belo* the Court adverted to the fact that the employees, on occasion, exceeded the guarantee period and that in such weeks they received more than the guaranteed wage, but no weight was accorded that fact, and no attention was paid to the number of workweeks in which the guarantee was exceeded. In *Halliburton* the Court noted that the guarantee was exceeded "in about 20 per cent of the workweeks," but there is nothing to warrant a conclusion that the Court had established the requirement that there be a relationship between the number of hours for which pay is guaranteed and the number of hours customarily worked.

The decisions of lower federal courts illustrate the unsettled state of the law. Two Courts of Appeals adopted the "significant number of workweeks" test advocated by the Department of Labor. *McComb* v. *Sterling Ice & Cold Storage Co.,* 10 Cir. 1947, 165 F.

2d 265, *McComb* v. *Roig,* 1 Cir. 1950, 181 F. 2d 726; a third Court of Appeals upheld a guaranteed wage plan even though the employees involved never exceeded the hours guaranteed, *McComb* v. *Pacific & Atlantic Shippers Ass'n,* 7 Cir. 1949, 175 F. 2d 411; and this Court upheld the validity of a guaranteed wage plan without reference to the number of workweeks in which the hours worked had exceeded the guarantee, *McComb* v. *Utica Knitting Co.,* 2 Cir. 1947, 164 F. 2d 670.

Second, the purpose and history of the enactment of § 7 (e) in 1949 indicates congressional unwillingness to adopt the test advocated by the Secretary. When the Fair Labor Standards Act was originally enacted in 1938, the nation was in a period "of widespread unemployment and small profit." *Overnight Motor Transp. Co.* v. *Missel,* 1942, 316 U. S. 572, 578. The major purposes of the Act were to eliminate long hours and to spread work by increasing the cost of overtime to employers. With the improvement of the national economy, the Supreme Court upheld the validity of a guaranteed wage contract, indicating that it would not give the Act a rigid application which would make impossible the attainment by employers and employees of other objectives fully as meritorious as the spreading of employment, stating: "Many such employees value the security of a regular weekly income. They want to operate on a family budget, to make commitments for payments on homes and automobiles and insurance" and also: "When employer and employees have agreed upon an arrangement which has proven mutually satisfactory, we should not upset it and approve an inflexible and artificial interpretation of the Act which finds no support in its text and which as a practical matter eliminates the possibility of steady income to em-

ployees with irregular hours." *Walling* v. *Belo Corporation, supra,* at 635. The Department of Labor, strongly opposing this interpretation of the Act, attempted to obtain judicial[4] and then legislative reversal of the *Belo* doctrine. Many employer and employee groups, however, favored *Belo* and advocated legislative approval and expansion. During 1949, when revision of the Fair Labor Standards Act was being considered, these conflicting views were placed before Congress in the form of bills which would have: (1) expressly outlawed guaranteed wage contracts; (2) permitted their use, but subject to specific limitations including a "significant number of workweeks" test; or (3) permitted their use, without limitation as to the relation between hours worked and hours guaranteed. Congressional adoption of the third alternative in preference to the first or second alternatives which were advocated by the Department of Labor suggests that Congress favored *Belo* contracts and that it did not intend to limit their use in the manner suggested by the Secretary.

Other factors reinforce this conclusion. The inclusion of certain express limitations on the use of guaranteed wage contracts in § 7 (e) indicates that other limitations, not expressly stated, were not intended. And the precise statement in § 7 (f) (3) of a requirement similar to that contended for by the Secretary with respect to § 7 (e) supports a similar inference. Finally, the confusing state of the case law makes it unlikely that Congress intended to incorporate a "significant number of workweeks" requirement by the indirect method of including in § 7 (e) the phrase

[4] In *Walling* v. *Halliburton Oil Well Cementing Co.*, 1947, 331 U. S. 17, 25, the Administrator of the Wage and Hour Division, Department of Labor, contended that *Belo* had been wrongly decided. This contention was rejected by the Supreme Court.

"regular rate." Congress could hardly have found a less precise way to express such an intention.

Third, the judicial interpretation of § 7 (e) is contrary to the position advocated by the Secretary. In *Tobin* v. *Little Rock Packing Co.,* 8 Cir. 1953, 202 F. 2d 234, a guaranteed wage plan was upheld even though the employees *never* exceeded the guaranteed number of hours.[5] And recently the First Circuit has rejected the Secretary's argument in a persuasive and comprehensive opinion by Chief Judge Magruder. *Mitchell* v. *Brandtjen & Kluge, Incorporated,* 1 Cir. 1955, 228 F. 2d 291, aff'g D. Mass. 1955, 129 F. Supp. 675. We entirely agree with the reasoning and conclusion contained therein.

Judgment affirmed.

United States Court of Appeals for the Second Circuit

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 20th day of July one thousand nine hundred and fifty-six.

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[5] To the same effect is *Mitchell* v. *Adams,* M. D. Ga. 1955, 129 F. Supp. 377. The Secretary relies on the following cases as demonstrating judicial recognition under § 7 (e) of the "significant number of workweeks" test: *Sikes* v. *Williams Lumber Co.,* E. D. La. 1954, 123 F. Supp. 853; *Tobin* v. *Aronow,* D. Mont. 1951, 96 F. Supp. 279; *Tobin* v. *Morristown Poultry Co.,* E. D. Tenn. 1952, 21 CCH Labor Cases, Par. 66, 798; *Tobin* v. *Keystone Mfg. Co.,* W. D. Ark. 1952, 21 CCH Labor Cases, Par. 66, 911; *Tobin* v. *Wenatchee Air Service, Inc.,* E. D. Wash. 1952, 21 CCH Labor Cases, Par. 67,019; *Tobin* v. *Eurbank Motor Freight Lines, Inc.,* W. D. Tenn. 1952, 23 CCH Labor Cases, Par. 67,411. We think these cases are either erroneous or distinguishable on their facts.

Present: Hon. HAROLD R. MEDINA, Hon. CARROLL C. HINCKS, Hon. STERRY R. WATERMAN, *Circuit Judges*

JAMES P. MITCHELL, SECRETARY OF LABOR, ETC., PLAINTIFF-APPELLANT,

v.

HARTFORD STEAM BOILER INSPECTION AND INSURANCE COMPANY, DEFENDANT-APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

This cause came on to be heard on the transcript of record from the United States District Court for the District of Connecticut, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO,
Clerk.

By RALPH C. CURCIO,
Deputy Clerk.

Appendix B

STATUTORY PROVISIONS

Fair Labor Standards Act of 1938, as amended (c. 676, 52 Stat. 1060; c. 736, 63 Stat. 910, 29 U. S. C. 201):

SEC. 7* [63 Stat. 913].

(a) Except as otherwise provided in this section, no employer shall employ any of his employees who is engaged in commerce or in the production of goods for commerce for a workweek longer than forty hours, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

(b) No employer shall be deemed to have violated subsection (a) by employing any employee for a workweek in excess of that specified in such subsection without paying the compensation for overtime employment prescribed therein if such employee is so employed—

*(1) in pursuance of an agreement, made as a result of collective bargaining by representatives of employees certified as bona fide by the National Labor Relations Board, which provides that no employee shall be employed more than one thousand and forty hours during any period of twenty-six consecutive weeks, or

*(2) in pursuance of an agreement, made as a result of collective bargaining by representatives of employees certified as bona fide by the National Labor Relations Board, which provides that during a specified period of fifty-two

* Single asterisk (*) indicates amended provisions; double asterisk (**) indicates new provisions (as amended in 1949).

consecutive weeks the employee shall be employed not more than two thousand two hundred and forty hours and shall be guaranteed not less than one thousand eight hundred and forty hours (or not less than forty-six weeks at the normal number of hours worked per week, but not less than thirty hours per week) and not more than two thousand and eighty hours of employment for which he shall receive compensation for all hours guaranteed or worked at rates not less than those applicable under the agreement to the work performed and for all hours in excess of the guaranty which are also in excess of forty hours in the workweek or two thousand and eighty in such period at rates not less than one and one-half times the regular rate at which he is employed; or

(3) for a period or periods of not more than fourteen workweeks in the aggregate in any calendar year in an industry found by the Secretary of Labor to be of a seasonal nature,

and if such employee receives compensation for employment in excess of twelve hours in any workday, or for employment in excess of fifty-six hours in any workweek, as the case may be, at a rate not less than one and one-half times the regular rate at which he is employed.

* * * * *

**(d) As used in this section the 'regular rate' at which an employee is employed shall be deemed to include all remuneration for employment paid to, or on behalf of, the employee, but shall not be deemed to include—

**(1) sums paid as gifts; payments in the nature of gifts made at Christmas time or on other special occasions, as a reward for service, the amounts of which are not measured by or dependent on hours worked, production, or efficiency;

**(2) payments made for occasional periods when no work is performed due to vacation,

holiday, illness, failure of the employer to provide sufficient work, or other similar cause; reasonable payments for traveling expenses, or other expenses, incurred by an employee in the furtherance of his employer's interests and properly reimbursable by the employer; and other similar payments to an employee which are not made as compensation for his hours of employment;

**(3) sums paid in recognition of services performed during a given period if either, (a) both the fact that payment is to be made and the amount of the payment are determined at the sole discretion of the employer at or near the end of the period and not pursuant to any prior contract, agreement, or promise causing the employee to expect such payments regularly; or (b) the payments are made pursuant to a bona fide profit-sharing plan or trust or bona fide thrift or savings plan, meeting the requirements of the Secretary of Labor set forth in appropriate regulation which he shall issue, having due regard among other relevant factors, to the extent to which the amounts paid to the employee are determined without regard to hours of work, production, or efficiency; or (c) the payments are talent fees (as such talent fees are defined and delimited by regulations of the Secretary) paid to performers, including announcers, on radio and television programs;

**(4) contributions irrevocably made by an employer to a trustee or third person pursuant to a bona fide plan, for providing old-age, retirement, life, accident, or health insurance or similar benefits for employees;

**(5) extra compensation provided by a premium rate paid for certain hours worked by the employee in any day or workweek because such hours are hours worked in excess of eight in a day or forty in a workweek or in excess of the employee's normal working hours or regular working hours, as the case may be;

*(6) extra compensation provided by a premium rate paid for work by the employee on Saturdays, Sundays, holidays, or regular days of rest, or on the sixth or seventh day of the workweek, where such premium rate is not less than one and one-half times the rate established in good faith for like work performed in nonovertime hours on other days; or

*(7) extra compensation provided by a premium rate paid to the employee, in pursuance of an applicable employment contract or collective bargaining agreement, for work outside of the hours established in good faith by the contract or agreement as the basic, normal, or regular workday (not exceeding eight hours) or workweek (not exceeding forty hours), where such premium rate is not less than one and one-half times the rate established in good faith by the contract or agreement for like work performed during such workday or workweek.

**(e) No employer shall be deemed to have violated subsection (a) by employing any employee for a workweek in excess of forty hours if such employee is employed pursuant to a bona fide individual contract, or pursuant to an agreement made as a result of collective bargaining by representatives of employees, if the duties of such employee necessitate irregular hours of work, and the contract or agreement (1) specifies a regular rate of pay of not less than the minimum hourly rate provided in section 6 (a) and compensation at not less than one and one-half times such rate for all hours worked in excess of forty in any workweek, and (2) provides a weekly guaranty of pay for not more than sixty hours based on the rates so specified.

**(f) No employer shall be deemed to have violated subsection (a) by employing any employee for a workweek in excess of forty hours if, pursuant to an agreement or under-

standing arrived at between the employer and the employee before performance of the work, the amount paid to the employee for the number of hours worked by him in such workweek in excess of forty hours—

(1) in the case of an employee employed at piece rates, is computed at piece rates not less than one and one-half times the bona fide piece rates applicable to the same work when performed during non-overtime hours; or

(2) in the case of an employee performing two or more kinds of work for which different hourly or piece rates have been established, is computed at rates not less than one and one-half times such bona fide rates applicable to the same work when performed during non-overtime hours; or

(3) is computed at a rate not less than one and one-half times the rate established by such agreement or understanding as the basic rate to be used in computing overtime compensation thereunder: *Provided*, That the rate so established shall be authorized by regulation by the Secretary of Labor as being substantially equivalent to the average hourly earnings of the employee, exclusive of overtime premiums, in the particular work over a representative period of time; and if (i) the employee's average hourly earnings for the workweek exclusive of payments described in paragraphs (1) through (7) of subsection (d) are not less than the minimum hourly rate required by applicable law, and (ii) extra overtime compensation is properly computed and paid on other forms of additional pay required to be included in computing the regular rate.

*(g) Extra compensation paid as described in paragraphs (5), (6), and (7) of subsection (d) shall be creditable toward overtime compensation payable pursuant to this section.

U. S. GOVERNMENT PRINTING OFFICE: 1938